



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. _____ **77-1840**

CAROL MURPHY,
Petitioner,

v.

LINDA SMITH, aka LINDA DAVENPORT,
Administratrix of the Estate of William I. Smith, Deceased,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO**

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Administratrix of the Estate of William I. Smith, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review
the judgment herein of the Supreme Court of Ohio, en-
tered March 30, 1978.

OPINIONS BELOW

The Decision of the Court of Appeals of Hamilton
County, Ohio, granting Judgment in favor of the defen-
dant is printed in Appendix A hereto. The Judgment
Entry of the Court of Appeals for the First Appellate Dis-
trict of Ohio, under docket C-76765, dated November 23,

1977 and the Entry Granting Defendant's Motion to Dismiss in the Court of Common Pleas, Hamilton County, Ohio, under docket A-7602645 are printed in Appendix B and C, respectively attached hereto. The Entry of the Supreme Court of Ohio dated March 30, 1978 overruling the Motion for an Order Directing the Court of Appeals to Certify its Record is printed as Appendix D to this Petition. The Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Ohio on May 1, 1978, the 30th day of April being a Sunday and is printed as Appendix E.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (2). Rule 19 (1) of the Rules of the Supreme Court of the United States provides:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . ."

QUESTION PRESENTED FOR REVIEW

May a State Court dismiss an action where the facts of the Complaint reveal that an action was timely filed where the Complaint alleges that the plaintiff was a guest within the meaning of Section 4515.02 of the Revised Code of Ohio which was declared unconstitutional on July 23, 1975, and the action for personal injuries was filed within two years after that date, thereby denying the petitioner's right to equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

On June 26, 1969, the petitioner was a passenger in an automobile driven by William I. Smith, deceased. The Complaint filed on April 2, 1976 states that due to the negligence of the deceased, a one-car accident occurred, proximately causing injuries to petitioner. Counsel for defendant moved to dismiss the action, which Motion was granted by the Trial Court. The Court of Appeals of Hamilton County, Ohio affirmed, and the Supreme Court of Ohio overruled the Motion to Certify the record of the Court of Appeals.

THE REASONS FOR GRANTING THE WRIT

The Act of the Supreme Court of Ohio dismissing the Appeal from the affirmance by the Court of Appeals for the First Appellate District of Ohio of the dismissal by the Trial Court of the Complaint in effect deprived the petitioner of her rights of Equal Protection and Due Process guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

ARGUMENT

Petitioner says that where the facts of the Complaint reveal that the action for damages on account of personal injuries was timely filed and where the Complaint alleges that the petitioner was a guest within the meaning of § 4515.02 of the Revised Code of Ohio, which Statute was declared unconstitutional on July 23, 1975 by The Supreme Court of Ohio as violative of the Fourteenth Amendment of the Constitution, and after repeated affirmances of its constitutionality, and the action of petitioner was timely filed within two years after July 23, 1975, the cause of action arose on July 23, 1975.

Section 4515.02, Revised Code, provides:

"The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle."

In *Primes v. Tyler*, 43 Ohio St.2d 195, 331 N.E.2d 723, the Supreme Court of Ohio held that the Ohio Automobile Guest Statute was unconstitutional. The Ohio Guest Statute was first enacted as § 6308-6, Ohio General Code, and became effective on June 14, 1933, *L'Archer v. Rosenberger*, 31 ONP NS 137. The first case involving an interpretation of § 6308-6, Ohio General Code, considered by the Supreme Court of Ohio was *Vecchio v. Vecchio*, 131 Ohio St. 59, and, although the constitutionality of the Section was not raised by either party, a fair interpretation of that opinion is that the constitutionality was impliedly proved. In *Smith v. Williams*, 51 Ohio App. 404, 1 N.E.2d

643, the Court of Appeals for Scioto County specifically upheld the constitutionality of the Guest Statute. Subsequently, in *Rector v. Hyer*, (Ohio App., 41 N.E.2d 886), Judge Barnes, speaking for the Court of Appeals of Montgomery County, stated:

"The Guest Statute was enacted and became effective June 15, 1933. Since that time, this section has been before the Supreme Court many, many times. So far as we know or are advised, the constitutionality of this section has never been brought into question. We are unable to conclude that the contention made at the present time is well grounded."

This interpretation by all courts of Ohio remained unchanged until *Primes v. Tyler*, *supra*, and, in fact, as late as December 3, 1969, in the case of *Thomas v. Herron*, 20 Ohio St. 2d 62, 253 N.E.2d 772, The Supreme Court of Ohio impliedly recognized the validity of the Guest Statute. Thus, it may be fairly and accurately concluded that until July 23, 1975, an action by a guest predicated on simple negligence did not exist in this State; the sole basis for liability being willful or wanton misconduct. Consequently, the result of the decision in *Primes v. Tyler*, *supra*, was the creation of a new cause of action founded upon negligence for all those guests who had received injuries in an automobile collision.

It is therefore, the position of petitioner that her cause of action accrued on the date of the rendering of the decision in *Primes v. Tyler* and that, accordingly, this action was timely filed. It has been stated that, "The actual existence of a statute prior to a determination that it is unconstitutional is an operative fact and may have consequences which cannot justly be ignored; when a statute which has been in effect for some time is declared unconstitutional, questions of rights claimed to have become

vested, of status, of prior determinations deemed to have finality and acted upon accordingly, and of public policy in the light of the nature both of the statute and of its previous application, demand examination. It has been said that an all-inclusive statement of a principle of absolute retro-active invalidity cannot be justified." (16 Am.Jur. 2d, Constitutional Law, § 178, p. 405, citing *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 Sup. Ct. 217.) An unconstitutional law should not be applied in such a manner as to work a hardship on one who has acted in good faith and relied upon its validity. *State v. Garden City*, 74 Idaho 513, 265 P.2d 328. See also, *Fleuning v. South Carolina Electric and Gas Company*, 239 F.2d 277. This is particularly true, where, as here, the Supreme Court of Ohio and the appellate courts throughout this state have consistently and uniformly for more than forty years declared the Ohio Guest Statute to be constitutional.

It would be, we submit, grossly improper and unfair to penalize one who, in good faith, relied upon the Statute only to learn that it was later declared unconstitutional. It is, of course, true that it has ordinarily been held that an unconstitutional statute is void and of no force and effect, but exceptions to this rule have been recognized (see cases cited above). This is such an instance. Furthermore, the cause of action in negligence did not, in fact, "arise" until the Supreme Court's decision in *Primes v. Tyler*, *supra*, and we, therefore, urge that, for purposes of the Statute of Limitations, the cause of action of petitioner arose on the date that the Supreme Court of Ohio's decision was rendered.

CONCLUSION

The instant case presents an example of a denial of the rights of the petitioner because subsequent to her injury, the Supreme Court of Ohio determines that the Guest Statute of Ohio is unconstitutional when she, in effect, had no cause of action at the time of the occurrence because of her inability to show willful and wanton misconduct, the only right granted to her under the former Sections of the Code.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Cincinnati, Ohio 45202
(513) 241-8829

APPENDIX A

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

No. C-76765

CAROL MURPHY,
Plaintiff-Appellant,

v.

LINDA SMITH, aka LINDA DAVENPORT,
Defendant-Appellee.

DECISION

(Filed November 23, 1977)

Messrs. Edward J. Utz 1306 Fourth and Walnut Building,
36 East Fourth Street, Cincinnati, Ohio 45202, and Irwin
Katzman, 405 Schwartz Building, 906 Main Street, Cin-
cinnati, Ohio 45202, for Plaintiff-Appellant,

Messrs. Lindhorst & Dreidame, Mr. C. Donald Heile of
counsel, 1200 American Building, Cincinnati, Ohio 45202,
for Defendant-Appellee.

PER CURIAM.

Plaintiff's lawsuit for personal injury was dismissed be-
cause her action was barred by the two-year statute of limi-
tations. Her sole assignment is that the dismissal was error.

Plaintiff was a passenger in a one-car accident which
occurred June 29, 1969, allegedly caused by defendant's
negligence. On July 23, 1975, the Ohio Supreme Court

declared that the Ohio guest statute (R. C. 4515.20) was unconstitutional. *Primes v. Tyler* (1975), 43 Ohio St. 2d 195. Within one year thereafter, on April 2, 1976, plaintiff filed the instant lawsuit alleging negligence. In opposition to defendant's motion to dismiss, plaintiff claimed that the result of the *Primes* decision was the creation of a new cause of action founded upon negligence for all guests in automobile accidents. We disagree. We conclude that the dismissal was not erroneous.

We hold that *Primes*, in declaring the guest statute unconstitutional, did not create a cause of action. In *Norwood v. McDonald* (1943), 142 Ohio St. 299, at 309, Hart, J., defined a cause of action as "the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief." We must distinguish the cause of action from the remedy or right of action.¹ "The facts constitute the cause of action, and the legal form used to enforce the action is the remedy." *State ex rel. Wilson v. Preston* (1962), 173 Ohio St. 203, at 208. The guest statute (apparently) inhibited the right of action in that it sought to deny a remedy otherwise available to enforce the cause of action.² *Primes* declared this statutory impediment unconstitutional, and it

¹ "A 'right of action' is 'an adjective or remedial right to invoke the court for redress of the wrong,' . . . more simply, the 'right to sue.'" *Fox v. Morrison Motor Freight, Inc.* (1971), 25 Ohio St. 2d 193, at 200. See Ballantine's Law Dictionary at 182 (3rd Ed. 1969).

² It is conceivable that the guest statute could be considered to have eliminated a cause of action, not a right of action. This interpretation could stem from the wording of the statute: "The owner, operator or person responsible for the operation of a motor vehicle *shall not be liable* for loss or damage . . . unless . . . caused by the willful or wanton misconduct . . ." (Emphasis added.) It could be argued that this language eliminated the underlying liability for negligent operation. We reject this interpretation, but even were it taken as valid, our decision would not be disturbed. The declaration of unconstitutionality rendered the statute void and of no effect from the date of its enactment. The

did not remove or otherwise alter the underlying cause of action.

In the instant case, the statute of limitations for bodily injury began to run on June 29, 1969; that is, upon the occurrence of the facts which constituted appellant's cause of action. The two years ended June 28, 1971, almost five years before the instant lawsuit was filed. If appellant felt inhibited by the apparent impediment of the guest statute, she had the same right to judicial determination of unconstitutionality as had the prevailing party in *Primes*.

We conclude that the statute of limitations had run prior to the filing of the instant lawsuit, thus eliminating appellant's right of action. The assignment of error is without merit.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Finding no error, we affirm.

PALMER, P. J., BETTMAN and BLACK, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

real "cause of action" was never affected, the statute being unconstitutional *ab initio*. *Primes v. Tyler, supra*, at p. 196-7. Further, our examination of the *Primes* opinion fails to disclose whether the Supreme Court considered the guest statute to affect a cause of action or a right of action. On page 196 of Supreme Court said the guest statute absolves negligent drivers of nonpaying passengers of liability, whereas at page 203, the Court stated that the statute precludes a remedy by due course of law. Of course, the distinction we make here was not relevant to the issue in *Primes*, because whether the statute inhibited a cause of action or a remedy, it denied due process and equal protection of law.

APPENDIX B

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. C-76765

CAROL MURPHY,
Plaintiff-Appellant,

v.

LINDA SMITH, aka LINDA DAVENPORT,
Defendant-Appellee.

JUDGMENT ENTRY

(Filed November 23, 1977)

This cause came on to be heard upon the appeal on questions of law, the assignment of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignment of error is not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by her counsel, excepts.

6a

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A7602645

CAROL MURPHY,
Plaintiff,

v.

LINDA SMITH, aka LINDA DAVENPORT,
Administratrix of the Estate of William I. Smith, Deceased,
Defendant.

ENTRY GRANTING DEFENDANT'S
MOTION TO DISMISS

This cause came on to be heard on Defendant's Motion to Dismiss and the Court upon consideration of same and arguments of counsel find said Motion to be well taken and said Motion is hereby granted. Final judgment is entered for Defendant against Plaintiff at the costs of the Plaintiff.

Plaintiff's exceptions noted.

.....
C. DONALD HEILE
Attorney for Defendant

.....
EDWARD J. UTZ
Attorney for Plaintiff

7a

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1978 TERM
City of Columbus.) To wit: March 30, 1978

CAROL MURPHY,
Appellant,

v.

LINDA SMITH, aka LINDA DAVENPORT,
Appellee.

No. 78-85

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
for HAMILTON COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, \$20.00, paid by Edward J. Utz.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of
the Court this day of
..... 19.....
..... Clerk
..... Deputy

8a

APPENDIX E

IN THE SUPREME COURT OF OHIO

No. 78-85

CAROL MURPHY,
Plaintiff-Appellant,

v.

LINDA SMITH, aka LINDA DAVENPORT,
Defendant-Appellee.

NOTICE OF APPEAL

Now comes the Plaintiff-Appellant and gives notice of the appeal to the Supreme Court of the United States from the Order denying the Motion to Certify in this Court.

.....
EDWARD J. UTZ
Attorney for Plaintiff-Appellant
1306 Fourth & Walnut Building
36 East Fourth Street
Cincinnati, Ohio 45202
(513) 241-8829

I hereby certify that a copy
of the foregoing instrument
has been served on counsel of
record this 1st day of May, 1978

.....
EDWARD J. UTZ
To: C. Donald Heile